United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7405

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-7405

PAT WRIGHT and JACK LIEBERMAN,

Plaintiffs-Appellants,

-against-

CHIEF OF TRANSIT POLICE, and CHAIRMAN and MEMBERS OF THE BOARD OF THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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TABLE OF AUTHORITIES

ARGUMENT

I.

Defendants apparently concede that there are times and places within the subway system at which plaintiffs' activities would not be disruptive or hazardous. There is not a word to the contrary in their brief. Instead, defendants argue that selling newspapers "throughout" the system, Def. Br., p.1, and "uncontrolled peddling and solicitation," id., p.16, could be dangerous and interfere with subway operations. But the record is clear that plaintiffs have never asserted such unlimited rights and have always been willing to abide by reasonable regulations and controls governing the time, place and manner of their activities.

Defendants argue that they lack sufficient personnel to provide "adequate enforcement" of any regulation short of the total ban. Def. Br., p.14. They point to their duty under state law to exercise "reasonable care" in enforcing safety regulations. Id., pp.14-15. This argument lacks merit. Nothing in the record suggests that enforcement of less restrictive regulations would require more personnel than are required to enforce the present total prohibition. There is no reason why defendants' state law duty would not be met through enforcement of reasonable

regulations by the same transit police personnel and procedures which are used to enforce the total ban and the numerous other laws and regulations which apply throughout the system.

To be sure, it might not be feasible for defendants to provide constant supervision of plaintiffs' activities. But there is no need for constant supervision in order to provide adequate enforcement of the regulations sought by plaintiffs, just as constant supervision is neither needed nor employed to enforce other laws and regulations under defendants' jurisdiction.

Defendants attempt to distinguish the controlling decision in Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968), on the ground that the Port Authority has only one bus terminal while the subway system has a number of facilities. Def. Br., pp.15-16. But nothing in Wolin suggests that the decision would have been different if the Port Authority operated more than one terminal. 1/

Defendants cite Adderley v. Florida, 385 U.S. 39 (1966), and Greer v. Spock, ___U.S.___, 96 S.Ct. 1211 (1976),

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1/ Although the number of stations is not relevant to justification of the total ban, plaintiffs recognize that differences in the size and traffic at defendants' various facilities could be a factor in framing the less restrictive regulations sought by plaintiffs. See Wolin v. Port of New York Authority, supra, 392 F.2d at 93-4.

as cases involving "state interests sufficient to proscribe otherwise permissible First Amendment activity." Def. Br., p.16. But the Supreme Court and lower courts have consistently refused to enforce such proscriptions in numerous decisions involving settings far more similiar to this case than the jailhouse in Adderley or the military base in Greer. In addition to Wolin v. Port of New York Authority, supra, see, e.g., Brown v. Louisiana, 383 U.S. 131 (1966) (silent demonstration in public library); Edwards v. South Carolina, 372 U.S. 229 (1963) (demonstration on state house grounds); Tucker v. Texas, 326 U.S. 517 (1946) (handbilling in government-owned town); Chicago Area Military Project v. Chicago, 508 F.2d 921 (7th Cir. 1975), cert. denied, 421 U.S. 992 (1975) (leafletting at airport terminal); United States v. Gourley, 502 F.2d 785 (10th Cir. 1973) (handbilling at Air Force Academy); Kuszynski v. Oakland, 479 F.2d 1130 (9th Cir. 1973) (leafletting at airport terminal); Jones v. Board of Regents, 436 F.2d 618 (9th Cir. 1970) (handbilling on campus of state college); In re Hoffman, 64 Cal. Reptr. 97, 434 P.2d 353 (Sup. Ct. 1967) (in bank) (leafletting at railroad station); People v. St. Clair, 56 Misc.2d 326, 288 N.Y.S.2d 388 (N.Y. Crim. 1968) (leafletting in New York City subway station).

Further, neither Adderley nor Greer upheld a total ban on distribution of literature. In Adderley, the Court

upheld convictions of individuals who conducted a boisterous demonstration at a jailhouse, without warning to or permission from the sheriff in charge, and who continued to demonstrate after the sheriff requested them to depart. 2/ In Greer, the Court upheld a ban on political rallies on a military base, in view of "'the historically unquestioned power of [its] commanding officer to exclude civilians from the area of his command.' [citation omitted.]" 96 S.Ct. at 1217. This power is rooted in the Constitution, no less than the First Amendment. Id., n.8.

Greer also involved a regulation of the distribution of literature, Fort Dix, Reg. 210-27. The regulation required citizens to obtain permission from the base commander before distributing publications. The plaintiffs in Greer did not submit publications and apply for permission in accordance with the regulation, and hence the case "simply [did] not raise any question of unconstitutional

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2/ The Court distinguished Edwards v. South Carolina, supra, on the ground that "state capitol grounds are traditionally open to the public. Jails, built for security purposes, are not." 385 U.S. at 41. Compare Brown v. Louisiana, supra, decided the same term as Adderley, which upheld citizens' rights to conduct a silent demonstration in a public library. Like state capitol grounds and a public library, the subway system is traditionally open to the public.

application of the Regulation to any specific situation." 96 S.Ct. at 1218. The Court therefore did not address the issue of this case, where defendants have denied plaintiffs' request for permission to distribute papers in the subway system. In any event, even if the Court had upheld a ban on literature distribution at Fort Dix, the decision would have no bearing on the present case because defendants have nothing even remotely analogous to a military commander's "historically unquestioned power," constitutional in origin, to exclude civilians from his post.

Defendants argue that their total ban is permissible because it bars all literature distribution without regard to content, citing Hudgens v. NLRB , 424 U.S. 507 (1976), Def. Br., p.17. It is true that the invalidity of defendants' ban would be heightened if it depended upon the content of plaintiffs' publications. But content-related censorship is by no means the only vice within the scope of First Amendment protection. All the cases cited on p.3 above involved regulations which were unrelated to content, and in each case the regulation was nevertheless invalidated.

There is no merit in defendants' argument that their ban is justified by their interest in preserving their $250,000 revenues from newsstand concessions. Def. Br., pp. 18-20. As pointed out in our principal brief, pp.21-3, col-

lection of these revenues is not a compelling state interest and, in any event, there is no reason to believe -- and certainly no basis to find -- that a relaxation of the total ban would impair the revenues. There is no basis in the record -- and none is suggested by defendants -- for their speculation that their revenues "can be destroyed" if relief is granted to plaintiffs. Def. Br., p.18.

The cases cited by defendants on this issue do not support their position. In Grosjean v. American Press Co., 297 U.S. 233 (1936), Murdock v. Pennsylvania, 319 U.S. 105 (1943), and Follett v. McCormick, 321 U.S. 573 (1944), all cited at Def. Br., p.19, the Court struck down various schemes which limited citizens' freedom to exercise their First Amendment rights. Hence those cases support plaintiffs, not defendants.

In United States Labor Party v. Codd, 527 F.2d 118 (2d Cir, 1975), Def. Br., p.20, this court upheld an ordinance requiring persons wishing to use bull horns on city streets to pay a $5.00 permit fee. The court held that the fee was reasonable because it was less than the administrative cost of issuing the permits, and there was no proof that the plaintiffs were unable to pay it. Thus, while the decision might be read to support a regulation imposing a nominal permit fee upon plaintiffs' activities,

it provides no support whatever for total prohibition.

II.

Defendants characterize their ban as prohibiting "only" the "manner" of selling employed by plaintiffs. Def. Br., p.12. The only "manner" which is not banned, however, is selling through the established newsstands. See Def. Br., pp.7, 16.

The basic issue in this case is whether defendants may totally prohibit plaintiffs from selling papers by the method they have chosen and found effective -- personal selling by hand. That issue was raised on the prior appeal and the court ruled that defendants' ban on plaintiffs' method could be sustained only if defendants proved a compelling state interest at trial. 3/

Nevertheless, defendants argue now, as they did before, that the total ban on plaintiffs' method of selling is somehow validated by defendants' offer to permit plaintiffs to sell through newsstands. That argument is foreclosed by the prior decision. However, because defendants continue to emphasize the point, and because it goes to the heart of the litigation, we conclude

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3/ The panel which decided the prior appeal was well aware of plaintiffs' method of selling. See App., p.12, n.1. See also the briefs on the prior appeal.

this reply by demonstrating anew that interlocking guarantees of free speech and free press protect plaintiffs' method of selling from defendants' absolute ban.

The personal selling of papers by the present plaintiffs is protected by the First Amendment, no less than the gratis distribution of leaflets in Wolin v. Port of New York Authority, supra. The First Amendment protects the distribution of publications by way of sale, as well as by way of donation. 4/ As the Court stated in Murdock v. Pennsylvania, supra:

> "It should be remembered that the phlets of Thomas Paine were not distributed free of charge." 319 U.S. at 111.

The Amendment protects plaintiffs' freedom to sell publications in person to members of the public, not merely to news dealers as suggested by defendants.

4/ See, e.g., Ginzburg v. United States, 383 U.S. 463, 474 (1966) (sellers of allegedly obscene publications); Smith v. California, 361 U.S. 147, 150 (1959) (retail bookseller); Jos. Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-2 (1952) (commercial producer of motion pictures); Murdock v. Pennsylvania, 319 U.S. 105, 110-11 (1943) (evangelist selling religious publications); Wulp v. Corcoran, 454 F.2d 826, 834-5, n.13 (1st Cir. 1972) (members of SWP selling newspapers); Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971) (Black Panthers selling party newspaper). Cf., Bigelow v. Virginia, 421 U.S. 809, 818-27 (1975) (publisher of advertisement for abortion service); N.Y. Times v. Sullivan, 376 U.S. 254, 266 (1964) (publisher of paid advertisement containing non-commercial message).

Personal selling is a method employed by plaintiffs to spread their ideas and build support for their party's policies and candidates. The essence of the method is the conjoining of the sale of papers with personal contact and peaceful discussions.

The value of this conjunctive use of speech and press in communicating plaintiffs' ideas is manifest in the record. If the publications contain material which stimulates a purchaser's interest or raises a question in his or her mind about socialism, the personal seller is in a position to answer the questions and capitalize on the interest. Such discussion not only improves communications with readers but also provides an opportunity to catch the interest of non-readers who pause to listen. Many of these may well end up buying papers as a result of what they hear. Even if not, many will depart with improved understanding of plaintiffs' program.

Distribution to newsstands is no adequate substitute for plaintiffs method of selling their papers. If limited to newsstands, plaintiffs would be deprived of personal contact with purchasers and other interested persons and would be prevented from employing discussion in conjunction with the sales of their papers.

Interlocking constitutional guarantees of free speech and free press protect plaintiffs' rights to employ these elements in conjunction, as well as separately. Cf., Thomas v. Collins, 323 U.S. 516 (1945) [illegible]:

> "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights [citation omitted], and therefore are united in the First Article's assurance."

In Wolin v. Port of New York Authority, supra, this court squarely held that the plaintiff was entitled to employ several modes of expression in conjunction and that he could not be relegated to only one of those modes. The plaintiff had worked out a method of communication which consisted of distributing leaflets, conversing with interested persons, carrying placards and setting up a card table for display of literature. The Port Authority prohibited all these activities.

The district court held that the plaintiff's leafletting was protected by the First Amendment and hence could not be prohibited by way of the Port Authority's absolute ban. But the court did not grant relief with respect to the other elements of the plaintiff's

method. Both sides appealed.

This court affirmed as to the leafletting but modified the order as to the other elements. The court held that they, too, were immune from the Authority's absolute ban:

> "Whether we speak of placards or conversation or tables laden with literature we deal with forms of communication developed to express the plaintiff's views to the particular audience. The techniques involved here are peaceful and orderly; we deal with an attempt to communicate directly by forms that are classic in simplicity and worthy of emulation. Ronald Wolin does not present us with a program of coercion or defiance of laws or physical confrontration. He asks that he and his associates be permitted to stand with placards and converse with persons who accept their handbills; also, that they be allowed to set their display on tables rather than floors. In this context, such activity is the substance of the 'free trade in ideas' no less than the soapbox orator [citation omitted]. No less than the leaflet, the newspaper, or the oration it appeals to 'the power of reason as applied through public discussion,' Whitney v. People of State of California, 274 U.S. 357, 375, 47 S.Ct. 641, 748, 71 L.Ed. 1095 (1927)(Brandeis, J. concurring)." 392 F.2d at 92-3.

In sum, like the present case, Wolin involved a method of communication which incorporated multiple modes of expression, each of which fell within the scope of First Amendment protection. This court held that the district court was mistaken in limiting the plaintiff's relief to the leafletting mode, because the First Amend-

ment protected the plaintiff's use of all of the modes in conjunction.

The same is true of the present plaintiffs' conjunctive use of speech and the sale of papers. Indeed, no method of communication is entitled to a higher degree of First Amendment protection than plaintiffs' method of selling publications by hand in conjunction with personal contact and peaceful discussion, primarily for the purpose of propagating ideas rather than for personal gain. Cf., Murdock v. Pennsylvania, supra. 5/

It follows that this court correctly ruled on the first appeal that plaintiffs' method of propagating their views is protected from defendants' absolute ban, absent the compelling state interest which defendants failed to show at trial.

5/ Murdock involved Jehovah's Witnesses who travelled about seeking to spread their religious doctrine by way of speaking to individuals, playing recordings and selling them publications reflecting the Witnesses' views. As the Court stated:

> "This form of evangelism . . . is more than preaching; it is more than distribution of religious literature. It is a combination of both." 319 U.S. at 108-9.

CONCLUSION

The judgment should be reversed for the reasons stated above and in plaintiffs-appellants' principal brief.

Respectfully Submitted,

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On the Brief:

Herbert Jordan
K. Randlett Walster

Dated: New York, New York
November 19, 1976

UNITED STATES COURT OF APPEALS
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PAT WRIGHT and JACK LIEBERMAN, :

Plaintiffs-Appellants, :

-against- : Docket No. 76-7405

CHIEF OF TRANSIT POLICE, and CHAIRMAN and MEMBERS OF THE BOARD OF THE NEW YORK CITY TRANSIT AUTHORITY, : AFFIDAVIT OF SERVICE BY MAIL

Defendants-Appellees. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Marsha Kaplan, being duly sworn, deposes and says:

I am not a party to this action, am over 18 years of age, and reside at 2879 West 12th Street, 20-0, Brooklyn, New York 11224.

On November 18, 1976, I served the Plaintiffs-Appellants' Reply Brief on Alphonse E. D'Ambrose, Esq., attorney for Defendants-Appellees in this action at 370 Jay Street, Brooklyn, New York 11201, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in a post office official depository under the exclusive care and custody of the United States Postal Service within the State and City of New York.

Marsha Kaplan
MARSHA KAPLAN

Sworn to before me this
19th day of November, 1976

Notary Public

76-7405

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